erty would not, as here, fall upon the creditor, but upon the surety, which is clearly a more equitable result.

SURETYSHIP — NATURE OF DEFENCES. — A surety on a note, which on its face showed him to be liable as a principal, filed a bill to enjoin its collection on the ground that time had been given to the real principal. *Held*, that the suit was properly brought in equity, as the facts show no defence to an action at law. *Grier* v. *Flitcraft*, 41 Atl. Rep. 425 (N. J., Ch.). See NOTES.

TORTS — CEMETERIES — TRESPASS. — *Held*, that one having the right of burial in a lot which is part of a public cemetery, can bring trespass *quare clausum fregit* against the owner of the fee for a disturbance thereof. *Hoff* v. *Olson*, 70 N. W. Rep. 1121 (Wis.).

There is but scant authority on this point. The action has been allowed when the trespass was committed by a stranger. *Smith* v. *Thompson*, 55 Md. 5. And the principal case has the direct support of one other decision. *Bessemer, etc. Co.* v. *Jenkins*, 111 Ala. 135. The owner of a lot in a public cemetery is generally regarded, in this country, as having only a license to bury therein to the exclusion of others. *Page* v. *Symonds*, 63 N. H. 17. While a court might be justified in allowing the action of trespass to such a licensee against a stranger, on the ground of possession, still, to allow it against the owner of the fee can hardly be reconciled in any way with legal principle.

TORTS — DECEIT — MISREPRESENTATION AS TO INTENTION. — The defendant persuaded the plaintiff to convey land to him on a promise to supply the plaintiff with certain live stock, etc. The defendant did not supply the live stock, and, in fact, never intended to keep his agreement. *Held*, that an action of deceit will lie. *McCready* v. *Phillips*, 76 N. W. Rep. 885 (Neb.).

It is well settled that a false representation, in order to form the ground for an action of deceit, must be of some past or existing fact. Some jurisdictions hold, contrary to the present case, that a false representation as to a matter of intention, or a promise to perform an act made with the intention not to perform is not a misrepresentation of an existing fact upon which an action of fraud may be founded. *Dawe* v. *Morris*, 149 Mass. 191; *Farris* v. *Strong*, 48 Pac. Rep. 963 (Colo.). The better opinion seems to be, in accord with the present case, that an action of deceit will lie. In the oft-quoted words of Lord Bowen, in *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. D. 459, "the state of a man's mind is as much a fact as the state of his digestion," and a misrepresentation as to this state of mind is, therefore, a misstatement of an existing fact. *Swift* v. *Rounds*, 19 R. I. 527; *Stewart* v. *Emerson*, 52 N. H. 301.

TRUSTS — FRAUD BY AGENT — STATUTE OF FRAUDS. — Defendant orally agreed to act as agent for plaintiffs to purchase certain land in their name. He, however, had the conveyance made out to himself, paid for it with his own money and denied the agency. *Held*, that defendant is liable to plaintiffs as trustee *ex maleficio*. *Halsell* v. *Wise County Coal Co.*, 47 S. W. Rep. 1017 (Tex., Civ. App.).

There is much authority holding that the defendant is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within the section of the Statute of Frauds requiring declarations of trusts in land to be in writing. *Burden* v. *Sheridan*, 36 Iowa, 125; *Nestal* v. *Schmid*, 29 N. J. Eq. 458. The result in the principal case seems more just and to be reached by sounder reasoning. Agency, though created by an agreement, is properly a relation or status, which, for a particular purpose, is fiduciary, and involves the devotion of the agent to his principal's interests. An abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee. This trust, then, really results by operation of law, and so is not within the Statute of Frauds. Browne, Statute of Frauds, § 96; *Winn* v. *Dillon*, 27 Miss. 494; *Jenkins* v. *Eldredge*, 3 Story, 181, 290.

REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. By James Bradley Thayer. Boston: Little, Brown & Co. 1898. pp. xxxvi, 636.

It is a bold thing to say of a book that it expresses what has not been said before; but two things Professor Thayer emphasizes which before

now have had but a fragmentary expression. First is the point that our rules of evidence are neither logical nor wholly reasonable, but are, with their virtues and vices, true offsprings of the trial by jury. They are rules of convenience introduced *per doubt del lay gents*. Trial by jury, then, must first be understood; and in a complete and thorough manner the author traces it, step by step, illuminating his work with illustration. From the old trials, where the jurors knew the events they were trying, the growth of the conception of witnesses is traced, until rules became necessary for the giving of the testimony. Old rules are called on to explain what seem now to be anomalies; and among these anomalies is shown the so-called Best Evidence Rule. History, from this point of view, is now written for the first time, and written in a masterly and luminous style.

A second and equally important preliminary step is the discrimination between what is and what is not a rule of evidence. This leads to discussing Burden of Proof, Presumptions, carefully and conclusively, but from an unchanging standpoint — they do not involve rules of evidence. Especially full is the treatment of the various rules of law misnamed the parol evidence rule, and much time is devoted to their application to wills. It is impossible to go into the mooted question as to whether the Court, in construing a will, really looks to the testator's intention, as the author believes, or whether it holds intention wholly irrelevant. This question, at all events, is not one of the law of evidence, except so far as it deals, under Professor Thayer's views, with the rule excluding, in most cases, direct statements by the testator of his intention.

Having cleared the ground of this mass of spurious undergrowth, the author is ready to treat of the law of evidence proper, and the preliminary gives good promise for the further work. But in the last chapter he pauses to glance over the law of evidence as a whole, points out its failings, and suggests a remedy. This he finds in the discretion of the judge. A recognition of such increased judicial power may be hard to obtain in this country; but the wisdom of a change along this line is clear. Legislative reform of law is often a bungling affair, not likely to be carried out with the nicety which the present subject requires; and no one who has seen the workings of an English *nisi prius* court, in which the judge has wide discretion and debates on points of evidence are rare, can doubt that this power, wielded by competent hands, could accomplish beneficial results.

J. G. P.

LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. Delivered before the Dwight Alumni Association by William D. Guthrie. Boston: Little, Brown & Co. 1898. pp. xxviii, 265.

This series of lectures is interesting, and the treatment of the subject scholarly. The history of the Fourteenth Amendment is told, and the scope and meaning of its terms are carefully discussed. Particularly satisfactory is the treatment of "due process of law." Full weight in that connection is properly allowed to the general usages of mankind, and great discretion is conceded to belong to legislatures, so long as their power is not arbitrarily used. It may well be regarded as an error to support the decision — *C. B. &c. R. R.* v. *Chicago*, 166 U. S. 226 — that